No. 235

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

Cases—Continued. Page

Cases—Continued. Page

Cases—Continued. Page

Statutes:

Statutes—Continued.

Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 235

THE UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 10–25) is reported at 60 F. Supp. 807. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 41–48) is reported at 153 F. 2d 958.

JURISDICTION

The judgment of the court below was entered on February 14, 1946 (R. 48). A petition for rehearing, filed by the United States, was denied on March 29, 1946 (R. 49). The petition for writ of certiorari was filed on June 26, 1946, and was

granted on October 14, 1946 (R. 50). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover from third-party tortfeasors the salary paid to, and the hospital expenses incurred in treating, members of its armed forces during the period their services are lost to the Government due to the negligence of such tortfeasors.

2. Whether the right to such recovery is to be determined by state or federal law.

3. Whether, if the United States has a right to recover, its recovery may be barred by a release executed by the injured soldier.

STATUTE INVOLVED

Section 49 of the California Civil Code, as amended, provides as follows:

> § 49. *Abduction, Seduction, Injury, to Servant.*—The rights of personal relations forbid:
>
> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;
>
> (b) The seduction of a person under the age of legal consent;
>
> (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.

STATEMENT

On January 23, 1945, the United States filed a complaint in the United States District Court for the Southern District of California, Central Division (R. 2–4) to recover the salary paid, and the reasonable value of the medical expenses and hospital care furnished by the United States to its servant, John Etzel, a soldier in the Army of the United States, during the period of his incapacitation due to injuries he suffered on February 7, 1944, as a result of the negligent operation by respondent Boone of a truck owned by respondent Standard Oil Company of California. The complaint sought judgment in the amount of $192.56, consisting of $123.25 for hospital care and $69.31 for salary paid during the period Etzel's services were lost to the Government (R. 4).[1]

Respondent's answer (R. 5–7), filed March 13, 1945, denied that Etzel was a servant of the United States; denied that respondent Boone was an agent of the respondent Standard Oil Company; denied that Etzel had been injured as the result of respondents' negligence; and affirmatively pleaded that the complaint failed to state a claim upon which relief could be granted; that Etzel had been contributorily negligent; and that on March 16, 1944, Etzel had executed a general

[1] It was later stipulated between the parties that $123.25 in fact represented "the fair and reasonable value of hospital care necessarily required for John Etzel * * *" (R. 8).

release in favor of respondents, discharging them from liability for the accident.

Following a trial without jury, the district court entered findings of fact, conclusions of law (R. 27–31), and a judgment awarding damages in the amount sought by the United States (R. 32–33). In its opinion (R. 10–25) and in its findings the court held that Etzel's injuries and the consequent loss of his services as a soldier to the Government had been caused solely by respondents' negligence; that in such circumstances, and in view of the fact that the United States was obligated to pay Etzel's salary during his period of incapacitation, and to provide necessary hospital care, the Government was entitled to recover in the amount and for the items of damage alleged; and that as Etzel had sustained no loss of earnings nor had become obligated to pay any sum for hospitalization during the period of his disability, the release which he executed in favor of the respondents was ineffective to discharge their independent liability to the Government for the losses which it had suffered (R. 27–31).

On appeal (R. 33) the court below reversed (R. 40–48), holding that the existence of a right of action in the Government for the items of damage alleged was a question to be determined by reference to California law; that the government-soldier status was not one protected by

California law, since it did not fall within the master-servant category of Section 49 of the California Civil Code; and that the general release executed by Etzel barred the United States from asserting any right of subrogation or indemnification against the respondents for the hospital expenses incurred or the salary paid Etzel.'

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals below erred:

1. In holding that the United States may not recover from a tortfeasor the hospital expenses incurred in treating, and the salary paid to, a member of the armed forces during the period of his incapacitation due to injuries inflicted upon him by the tortfeasor.

2. In holding that the existence of such right of recovery is a question to be determined by state rather than federal law.

3. In failing to hold that under federal law such right of recovery exists.

4. In holding that a release given the tortfeasor by the injured soldier bars the United States from asserting its independent right of recovery based on loss of the soldier's services.

5. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I. The rights of the United States in this case are governed by federal law, and are neither de-

pendent on nor governed by the provisions of the California Civil Code.

The doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, under which a federal court sitting in diversity cases is bound to apply the law of the state in which it sits, is wholly inapplicable to situations where the rights asserted are those of the United States in the exercise of its constitutional functions, or where the rights of the parties were federally created. This limitation on the *Erie-Tompkins* doctrine, foreshadowed on the very day it was evolved (*Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110), has been adhered to ever since; this Court has consistently held that where the United States appears as a litigant, asserting a governmental right arising out of governmental activities, its rights are governed by federal law, to be fashioned by the federal courts. E. g., *Board of Commissioners* v. *United States,* 308 U. S. 343; *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Allegheny County,* 322 U. S. 174.

The relationship between the United States and its soldiers rests on the constitutional authority to "provide for the common defense," "To raise and support Armies," and "To make Rules for the Government and Regulation of the land * * * Forces." That circumstance emphasizes the error of the court below in denying recovery on the ground that the California legislature did not in-

tend to extend protection to the government-soldier relationship. If, as we believe, that relationship is such as to allow recovery here, then obviously no state legislature can abridge the right. The United States should not be subject to varying consequences from that relationship simply because the soldier marches across a state line. The government's authority in this respect cannot be subject to local controls, see *United States* v. *Allegheny County*, 322 U. S. 174, and certainly if a cause of action had been recognized prior to the enactment of the California Code, no subsequent act of the state legislature could prevent the Government from later pursuing its cause of action.

The federal law which governs the government-soldier relationship must be fashioned, as in other cases of first impression, from the materials at hand. To those we turn.

II. The right here asserted by the United States, to recover damages for the loss of services of one of its soldiers, rests upon well-settled principles of legal liability. The essential right asserted, to recover damages for injury to a status relationship which results in loss of services due by reason of that relationship, is as old as the common law itself. Bracton, *f. 115. It is the right pursuant to which the traditional common law permitted the master to recover damages for the loss of services of his apprentice or other servant, which gave the husband a right of action

when he lost the services or consortium of his wife, and which gave the parent a similar right to indemnity when he could show deprivation of the services of a child. The modern relationship of government and soldier likewise involves a status, see *In re Grimley*, 137 U. S. 147, 151–152, and its incidents are similar; we contend that it should support a similar action for loss of services resulting from a third party's tort, and for expenses of hospital care directly attributable thereto.

1. (a) The gravamen of the husband's action for interference with relationship with his wife is not only loss of services, but loss of consortium as well. When, however, the defendant is not a rival for the wife's affections, but simply injures her, by negligence or otherwise, the basis of the action is loss of services, grounded on the circumstances that the husband is entitled to the services of his wife, and is bound to maintain her. The tortfeasor who deprives him of the one and requires him to incur medical expenses in respect of the other is bound to indemnify the husband accordingly.

(b) The relationship between parent and child likewise gives rise to a status, and, where the child has been tortiously injured by a third person, the parent has an action against the tortfeasor—for loss of services. That this is the basis of the action is graphically illustrated by the cases involving seduction; the daughter herself can have no action, having consented, but her

father (or one standing *in loco parentis*) recovers for loss of her services to him. Indeed, the very circumstance that loss of services is the foundation of recovery has made the action an unsatisfactory remedy in many situations. But by the weight of American authority, the parent can recover for medical expenses incurred in treating the injured child, even apart from services, since he was bound to do so under his general duty of maintenance.

(c) Similarly, there is recovery for loss of services in the basic relationship of master and servant or master and apprentice; any tort which deprives the master of the services to which he is entitled by virtue of the relationship is actionable. The master-apprentice relation is particularly significant here since it often had its inception without the consent of the apprentice.

2. A number of modern cases deny the master the right to recover for loss of the servant's services, primarily on the ground that the modern employer-employee relation is almost wholly contractual, and thus varies from the older master and servant status of the common law. The cases on loss of services and expenses for maintenance and cure of seamen go both ways; where recovery is denied, it is on the ground that a social condition does not exist between the seaman and his employer. If, then, the bonds between a soldier and his government are relational, giving rise to

a status with incidents similar to those of statuses traditionally protected, this line of modern employer-employee cases is not authority against recovery here.

3. The nub of the present case is that the government-soldier relationship is a status (*In re Grimley*, 137 U. S. 147, 151–152), to which the law attaches reciprocal rights and obligations, a status similar to but more binding than the others. The lot of the soldier is *more onerous than* that of a child, wife, servant, or apprentice, both as to the obligations involved, and in respect of termination of the status.

The government determines who shall and who shall not become a soldier. It has complete power of discharge, and absolute power of control; the soldier is bound at his peril to obey those in authority over him, and to refrain from disrespectful behavior to his military and civil superiors. Nor can he terminate the status at will; he may not absent himself, shirk service, or desert. Yet the government can unilaterally extend his term of service indefinitely, howsoever it may have been commenced or for what period.

For its part, the government has a duty, enforceable in the courts, to pay the soldier, and that despite his incapacity; and it is bound to subsist him and to provide him with medical care.

Comparison of the foregoing incidents with those of the other relationships shows that the government-soldier status is the most binding of

all. A mere servant may leave his employer or (at least in modern times) go on strike; these actions in a soldier constitute the offenses of desertion and mutiny. An apprentice could emancipate himself by enlisting in the armed forces; a soldier who enlists in the Navy or Marine Corps commits desertion. An unhappy wife can more easily terminate her marriage than an unhappy recruit his military status. And a child may emancipate itself from parental control far more readily than a soldier can free himself from the "avuncular" (*White* v. *United States*, 270 U. S. 175, 180) tie that binds him to the government.

In short, the relationship involved here presents precisely those elements which historically gave rise to and which have continued to vitalize the loss-of-services doctrine. The holding below, that protection will not be afforded a relationship similar to but more binding than statuses historically protected simply because the formation and continuation of the modern employer-employee relationship is more consensual than formerly, is, we submit, both anomalous and untenable.

4. The circumstance that the inception of the government-soldier relationship here was nonconsensual is immaterial. A voluntary enlistment is contractual, but the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same. *Selective Draft Law Cases*, 245 U. S. 366, 371; see 50 U. S. C. App. 303 (d).

The situation of the drafted soldier may involve a contract implied in law, but the gist of the matter is that the method by which the status is created is immaterial. The other statuses protected against torts which result in a loss of services are not necessarily consensual, e. g., parent-child and apprenticeship of pauper children, yet those relationships have never been denied protection on that ground.

5. Nor is there relevance in the state cases which deny an injured militiaman the right to sue as an employee or servant under the local state workmen's compensation act. Those decisions merely consider the nature of the injured soldier's statutory rights against his government. Obviously the tortfeasor's liability remains unaffected by any arrangement which the government may independently make for the benefit of its soldiers. This is strikingly illustrated by the present statutory compensation scheme for Army reserve personnel injured while on active duty. The reservist on active duty for more than thirty days receives the same benefits as do Regular military personnel (10 U. S. C. 456), while if on duty for less than thirty days he must claim in the same manner as a civilian federal employee (5 U. S. C. 797). Obviously his military status is the same, and, equally obviously, the length of his tour can have no effect on the liability of the tortfeasor who injures him.

A public servant may well be a servant for purposes of trespass *per quod servitium amisit*, and yet not entail responsibility to the public body for his acts under the rule of *respondeat superior*. The two doctrines were historically separate, and today are wholly independent. An agent may bind his principal in many situations where the principal has no right to recover from a tortfeasor for loss of the agent's services. So, too, a parent may recover for loss of services of a child in circumstances where the child's actions could not possibly make the parent liable.

6. The basic substantive error of the court below is its unwillingness to apply the loss of service doctrine to the government-soldier relationship, a relationship in every essential respect identical with the traditional master-servant status (except only that it is far more binding), simply because the master-servant status of today, in its modern aspect of employer and employee, is essentially contractual in nature.

This Court has recognized the government-soldier relationship as a status, and, Sir Henry Maine notwithstanding, "new forms of status have been constantly arising and it is the fact that the societies in which they have arisen are progressive societies that is the cause and occasion for their creation." 3 Holdsworth, *History of English Law* (3d ed. 1923) 456. The circumstance that the present case is substantially one of first im-

pression should not deter the law today any more than it deterred the law two centuries ago; indeed, a case such as this one is really a measure of the law's vitality, and of its capacity for growth.

The government's right to the services of its soldiers is a right far superior to that of the master or husband or parent to the services of servant, apprentice, wife, or child. We submit that there necessarily exists a similar right to recover damages when a tortfeasor deprives it of those services, services growing out of a relation created by law pursuant to an express grant of constitutional power.

III. The release of his own claims executed by the soldier in respondent's favor is immaterial.

1. The government's claim is an independent cause of action, collateral to and not consequent upon the soldier's claim. The master sues for loss of services, the servant for personal injuries. The servant may recover for a battery when beaten, the master only if the battery has resulted in a loss of services. *Robert Marys's Case,* 9 Co. Rep. 111b, 113a. The same is true of parents' and husbands' actions. The parent can recover where the debauched daughter cannot sue, or where the injured child has already recovered; the husband can recover for loss of services notwithstanding the failure of the wife to recover for personal injuries; and the master's action for loss of services has not up to now been barred by a recovery

by or a release from the injured servant, seaman, or soldier.

2. The same failure to recognize the distinct and separate nature of the government's cause of action for loss of services led the court below to rest its denial of recovery on the prevailing rule which denies the defendant tortfeasor the right to deduct from the damages he must pay sums previously received as compensation from employers or insurers by his victim. It may be that this rule is too generous for the injured person. But the injured servant's receiving too much is not good cause for denying the master any recovery at all for loss of services. Nor are the subrogation cases relevant; the basis of the employer's recovery there is the employee's claim for injury which the employer has theretofore paid. Here, however, the United States sues, not as the soldier's subrogee in respect of the injuries to his person, but in its own right, on account of the injury which caused it to lose his services.

3. Once the independent nature of the government's cause of action is recognized, all talk of splitting a cause of action likewise becomes irrelevant. Here there are two separate causes of action, not simply one cause of action consisting of numerous elements of recovery.

4. The measure of damages here was based on the government's out-of-pocket expenditures—pay and hospitalization—both of which it was required by law to make. Even in the parent-child cases

where there has been no recovery for services because the child was unable to render them, the parent has nonetheless recovered for medical expenses because he was bound to incur these costs as part of his duty of maintaining the child. If the soldier here had been discharged immediately after the accident, he could have recovered the expenses of hospitalization and of pay (as representing his loss of earnings) on his own account.

5. Actually, the measure of damages for loss of services was generous so far as the respondents were concerned; it was based on the view that the United States had been obliged to pay the soldier his statutory pay without receiving services in return. But that did not take into account the expense of subsisting the soldier, likewise an expenditure required by law, and likewise one which represented part of the soldier's earning power. Nor did the recovery for pay take into account the fact that the soldier might have been a trained man, the loss of whose services to the United States entailed greater damages than the loss of services of an untrained soldier in the same pay status.

ARGUMENT

The United States brought the instant action to recover the sum of $199.56, the amount that it disbursed for hospital and medical expenses and the salary which it paid to the soldier Etzel, injured as a result of the negligent operation of the respondent Standard Oil Company's truck by its

agent, respondent Boone.[2] The United States primarily rested its right to recovery on the common-law right of a master to recover for the loss of services of a servant tortiously injured by a third party. *Attorney General* v. *Valle-Jones,* [1935] 2 K. B. 209. The trial court, in a well-reasoned opinion, held that a third party who, through his tortious act, interferes with the "Government and soldier relation" to the detriment of the government, is responsible for the mischief he causes (R. 13–14).[3] It further held that the release which respondents obtained from the injured soldier was no bar to recovery by the United States, since the cause of action which the Government asserted was separate and distinct from the cause of action which had accrued to the soldier (R. 19–20). On appeal, the court below reversed, rejecting the trial court's conclusion that interference with the government-soldier relation, standing alone, was a sufficient basis for the action (R. 44). After determining that the Government could not maintain its action under California law as no master and servant relationship existed and California law did not recognize a right of recovery for an injury to the government-soldier relationship (R. 42–46), it concluded that, even had a government-soldier relation been

[2] The issue of negligence is not now contested (R. 35–36).

[3] Approved, Note (1945) 40 Ill. L. Rev. 269; cf. (1945) 59 Harv. L. Rev. 137.

sufficient to support an action for loss of services, the Government in the instant case would be barred by the general release executed in favor of respondents by the injured soldier (R. 46–48).

Our position here is that liability for the injury to the federal government-soldier relationship is governed by federal and not state law; that the federal law is, under accepted judicial techniques, to be fashioned from the materials at hand; that the government-soldier relationship is, in all of its incidents and elements, so similar to the master-servant, husband-wife, and parent-child relationships that it supports the same kind of action for loss of services which injury to those other statuses has always entailed; and that, since the government's cause of action for loss of services is one independent of any rights which the soldier may have, it is not barred by any recovery had or release executed by the injured soldier.

I

THE RIGHTS OF THE UNITED STATES IN THIS CASE ARE GOVERNED BY FEDERAL LAW, AND ARE NEITHER DEPENDENT ON NOR GOVERNED BY THE PROVISIONS OF THE CALIFORNIA CIVIL CODE

The court below held that the United States' right of recovery was governed by Section 49 of the California Civil Code (*supra;* p. 2), saying (R. 42):

> At the outset we are confronted with the problem of what law should apply. There

> is no federal statute which might afford the government a means for bringing this action and it has been held that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States* v. *The Thekla*, 266 U. S. 328, 339, 340, and see *United States* v. *Moscow-Idaho Seed Co.*, 92 F. 2d 170, 173, 174 (C. C. A. 9). Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of a private litigant. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 71, 78; *United States* v. *Moscow-Idaho Seed Co., supra*, pp. 173, 174.[1]

This holding, as we shall show, fails to give effect to decisions of this Court which have repeatedly and consistently enunciated the prin-

[1] The court below stated (R. 42) that counsel for the Government, in oral argument, in substance conceded that state law was controlling. In order to remove any misapprehension in that regard, the United States filed a motion for a rehearing, in which it set forth its position that federal and not state law was controlling and discussed at length what it conceives to be the controlling law. While the record does not set forth the petition for rehearing, we assume that counsel for respondents will concede the correctness of the foregoing facts. The court below denied the motion without opinion (R. 49), thus indicating that it did not rest its opinion upon any supposed concession by counsel.

ciple that the rights of the United States stemming out of the exertion of powers derived from the Constitution are to be determined by federal and not by state law.

1. The court below relied upon *United States* v. *The Thekla,* 266 U. S. 328. But the rule of that case is a limited one, as this Court has indicated; it is applicable only in admiralty cases where the subject matter of the claim is not the vessel libelled but the collision in which the libelled ship participates. See *United States* v. *Shaw,* 309 U. S. 495, 502–504. *United States* v. *Moscow-Idaho Seed Co.,* 92 F. 2d 170 (C. C. A. 9), also relied on by the court below, antedates the *Shaw* decision and simply parrots the quotation from *The Thekla.*

2. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is, of course, wide of the mark. That case held, overruling *Swift* v. *Tyson,* 16 Pet. 1, "with its numerous and sorry progeny," that, since a federal court in diversity of citizenship cases was a court of the state in which it sat (*Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108–109; *Angel* v. *Bullington,* No. 31, this Term, decided February 17, 1947) it was bound to apply the law of that state and was not free to fashion "general" law. The rule of *Erie R. Co.* v. *Tompkins* was soon held broad enough to include within the orbit of state law state doctrines of equity (*Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202), state rules of the conflict of laws (*Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487), and more recently, to cover state rules

as to equitable remedies (*Guaranty Trust Co.* v. *York*, 326 U. S. 99) and state notions of *res judicata* (*Angel* v. *Bullington*, *supra*). The rationale of all the foregoing cases is that neither the accident of a litigant's citizenship, nor of the state of its incorporation, nor of the court in which his or its claim is first presented, shall operate to change the rules of law governing the substantive rights of the parties.

3. But that doctrine is wholly inapplicable to situations where the rights asserted are those of the United States in the exercise of its Constitutional functions, or, indeed, where the rights of the parties were federally created or depend upon exertions of federal power. And this has been recognized at all times, contemporaneously with the development of the *Erie-Tompkins* doctrine. It is significant that, on the very day that *Erie R. Co.* v. *Tompkins* was decided, this Court, speaking through the same judge who delivered the opinion in that case, held in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, a decision involving an interstate compact, that (304 U. S. at 110) "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

The boundary limits of *Erie R. Co.* v. *Tompkins*, thus foreshadowed on the day it was decided, have been adhered to ever since; and numerous cases

have expressly held that, when the United States appears as a litigant, asserting a governmental right arising out of governmental activities, its rights are governed by federal law, to be fashioned by the federal courts. In those circumstances the *Erie-Tompkins* rule, the purpose of which is to insure that State causes be governed by State law regardless of the particular forum in which the litigation takes place, is both inapplicable and irrelevant. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick v. Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *Allegheny County*, 322 U. S. 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The controlling element in these cases was that each of them involved an exercise of federal power which had its ultimate origin in the Constitution. (It is, of course, settled beyond dispute that the United States in the performance of its constitutional functions can only act in a governmental capacity. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32.)

Thus, in *Board of Commissioners* v. *United States*, 308 U. S. 343, and in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, the question was whether interest was allowable. In the first case the principal sum represented a tax refund owing

to an Indian ward, in the second it was the amount due on a bond theretofore given the United States to secure the payment of taxes. In each case this Court held that the appropriate measure of damages for delayed payment of the sum due was to be determined by the federal courts according to their own criteria. Similarly, federal rather than state law was applied to determine the legal consequences of acts condemned by the National Bank Act (*Deitrick* v. *Greaney*, 309 U. S. 190), to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (*D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447), to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (*Clearfield Trust Co.* v. *United States*, 318 U. S. 363); and to determine whether particular heavy machinery was the property of the United States or of a private contractor to which the United States had made it available for war purposes (*United States* v. *Allegheny County*, 322 U. S. 174).

The reason for the distinction between the two lines of cases is graphically presented within a narrow compass by two very recent decisions, both of which involved actions brought on the equity side of a federal district court. In one, the right sued upon was state-created; it was held barred by a state statute of limitations because

it would have been so barred had it been brought in a state court. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. In the other, the right asserted was federally created, and accordingly the state statute of limitations was held not to be controlling. *Holmberg* v. *Ambrecht*, 327 U. S. 392. This Court said in the case last cited (pp. 394, 395):

> * * * The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress. * * *
>
> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. *Wheeler* v. *Greene*, 280 U. S. 49; *Christopher* v. *Brusselback*, 302 U. S. 500; *Russell* v. *Todd*, 309 U. S. 280, 285. And so we have the reverse of the situation in *Guaranty Trust Co.* v. *York*, *supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * *

It is perfectly clear, therefore, that the learning of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, that "There is no federal general common law," applies to diversity cases and not to situations where the United States is a litigant in connection with the assertion or exercise of governmental rights or functions. If state law were to be applied in cases such as this one, there would be presented the anomaly of federal courts declaring the state law as applied to facts which, since they involve the United States as a party, would probably never be presented to any state court for a decision. The truth of the matter is that in the field of federal activity, there still is a federal common law—though obviously it is not a federal *general* common law.

3. What is involved here is the relationship between the United States and its soldiers. The position of the United States in that connection rests on the constitutional authority to "provide for the common defence," "To raise and support Armies," and "To make Rules for the Government and Regulation of the land * * * Forces." These circumstances underscore and emphasize the error of the court below in denying recovery on the ground that the California legislature did not intend to extend protection to the government-soldier relationship (R. 43–45).

We need not here consider the divergent cases which deal with the problem of the militiaman's

status, and which consider whether he is an "employee" within the meaning of a local Workmen's Compensation Act.[6] Those cases rest at least in part on the relationship between that statute and the local military code, and perhaps reflect the unique constitutional position of state forces under the militia clause.[7] In any event, as we point out below, pp. 54–56, they are analytically irrelevant to a consideration of the tortfeasor's liability to the Government. Moreover, the significant point here is that the relationship sought to be protected in the present case is a purely federal one. If, as we believe, this relationship is such that recovery can be had, then obviously no state legislature can abridge the right. We think it equally clear that, in enforcing the rights growing out of the government-soldier relationship, the United States

[6] The following cases hold that a member of the state militia is within the coverage of the state compensation act. *Baker* v. *State*, 200 N. C. 252; *Globe Indemnity Co.* v. *Forrest*, 165 Va. 267; *State* v. *Industrial Comm.*, 186 Wis. 1; see *Andrews* v. *State*, 53 Ariz. 475 (*semble*, but very unclear). *Contra: Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396; *Lind* v. *Nebraska National Guard*, 144 Neb. 592 (alternative holding). Compare *Rector* v. *Cherry Valley Timber Co.*, 115 Wash. 31, holding a soldier in the United States Army, not a militiaman, to be an employee within the state compensation act.

[7] E. g., *Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396.

[7] See, for some recent discussions, Wiener, *The Militia Clause of the Constitution* (1940) 54 Harv. L. Rev. 181; Conway, *A State's Power of Defense under the Constitution* (1942) 11 Fordham L. Rev. 169; Colby and Glass, *The Legal Status of the National Guard* (1943) 29 Va. L. Rev. 839.

can not be subjected to the vagaries of divergent state statutes and decisions. Congress could undoubtedly so subject it by affirmative action, see *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, but in the absence of such action the relation between the Government and one of its soldiers is not one which evokes varying consequences simply because the soldier marches across a state line. Here "the desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

In this respect, the instant case falls within the rule of *United States* v. *Allegheny County*, 322 U. S. 174, where it was held that the Government's procurement policies, evolved pursuant to the federal power to raise armies, could not be defeated or limited by state law, and, further, that the purpose of the supremacy clause was to avoid the disparities, confusions, and conflicts which would follow if the Government's general authority were subject to local controls. The nature of the relationship between the Government and soldier, and the rights arising in the Government therefrom, are equally immune from state control. In short, had it been authoritatively determined that the United States had a cause of action against one who tortiously injured one of its soldiers, prior to the enactment of the California Code, no subsequent act of the state legislature could prevent the Government from asserting its right of action in the federal courts.

United States v. *Allegheny County*, 322 U. S. 174, 183, and cases there cited.

4. The government-soldier relationship, then, is governed by federal law, law which in this as in similar cases of first impression must be fashioned from the materials at hand. See *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367. To those we turn.

II

THE RELATIONSHIP BETWEEN THE UNITED STATES AND ITS SOLDIERS SUPPORTS AN ACTION FOR LOSS OF SERVICES BY THE UNITED STATES AGAINST THIRD PERSONS WHO HAVE TORTIOUSLY INJURED A SOLDIER

The right here asserted by the United States to recover damages for the loss of services of one of its soldiers, rests upon well-settled common-law principles of legal liability. *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. There the Crown was awarded damages for the loss of services of two aircraftsmen of the Royal Air Force tortiously injured by the act of a third party, on the strength of the common-law action for loss of services of a servant, the familiar trespass *per quod servitium amisit*; and it was held that the value of the hospitalization furnished and the wages paid the men while they were incapacitated constituted an appropriate measure of damages. In *Commonwealth* v. *Quince*, 68 Comm.,

L. R. 227, [1944] Argus L. Rep. 50, the High Court of Australia split sharply on the same issues; three of the judges held that the action could not be maintained because the Government-soldier status differed from the modern master-servant relationship, while the other two held that the action was well founded.[7] In Canada, after the Exchequer Court had held that the relation between the Crown and a member of its armed forces was not such as to support a claim against the Crown on the view that a master and servant relationship existed giving rise to the application of the doctrine of *respondeat superior*, see *McArthur* v. *The King*, [1943] 3 D. L. R. 225, the Canadian Parliament immediately amended the Exchequer Court Act to provide that "a member of the naval, military or air forces of his Majesty in right of Canada shall be deemed . . . a servant of the Crown." Canadian Statutes, 1943–1944, 7 Geo. VI, c. 25, § 1.[8] In the United States the question is virtually one of first impression.[9]

[7] Although holding that the action was not maintainable, one of the three majority judges joined the minority in holding that a recovery of hospital expenses and wages would be proper, assuming the relationship was one protected at common law. See 68 Comm. L. R. at 247. See *infra*, pp. 72–75.

[8] Thereafter the Appeal Division of the Supreme Court of New Brunswick held that the Act as amended applied only to the Exchequer Court and did not govern an action at common law. *Attorney-General of Canada* v. *Jackson*, [1945] 2 D. L. R. 438.

[9] In *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. Y.), recovery was denied; the action was

But, while the case may be a novel one on its facts, the essential right asserted is as old as the common law itself. It is the right to recover damages for injury to a status relationship which results in loss of services due by reason of that relationship. It is a right that was recognized by the earliest medieval commentators (Bracton, *f. 115; Britton (Nichols' tr., 1901 ed.) 109), a right which in the traditional common law permitted the master to recover damages for the loss of services of his apprentice or other servant, and which gave the husband a right of action when he lost the services or consortium of his wife, and the parent a similar right to indemnity when he could show deprivation of the services of a child. That same right is the foundation of the modern doctrine which stems from *Lumley* v. *Gye*, 2 E. & B. 216.[11] The question here is whether the modern relationship of government and soldier will

---

one for loss of services of a soldier who died shortly after being injured. Recovery was similarly denied in *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover the wages and cost of medical treatment furnished an injured Civilian Conservation Corps enrollee, on the ground that the United States Employees' Compensation Act provided the United States a means of recoupment—a method not here available.

[11] "It is pretty clear also that the famous decision in *Lumley* v. *Gye* to the effect that a persuasion to break any contract without just cause or excuse is actionable, is traceable historically to the firmness with which the judges have maintained the idea that the master has something in the nature of a real right to his servant's services." 3 Holdsworth, *History of English Law* (3d ed. 1923) 677.

support a similar action for loss of services resulting from a third party's tort, and for expenses of hospital care directly attributable thereto.

We contend that it will. We point out below the scope of the well-recognized common law action for loss of services, and show that its basis is injury to a status which gave the dominant party thereto a right to the services of and a duty to care for the servient party. We show that the cases which deny recovery in situations arising out of the modern employer and employee relationship do so because the latter relationship is held not to involve a status. We then examine the situation of the modern soldier with respect to the government's rights to his services and its duty to pay him and to provide him with medical care. We find that, as this Court has held, the government-soldier relationship creates a status, see *In re Grimley*, 137 U. S. 147, 151–152, and we point out that the incidents of the status are the same regardless of the method by which the status is created. The volunteer, who becomes a soldier through a contract of enlistment, stands on a footing identical with that of the man who has been drafted or conscripted by compulsion of law. We conclude that when, as here, a soldier has been incapacitated through the tortious act of a third party, the government is entitled to be indemnified by the tortfeasor for its loss of services, measured by the injured soldier's statutory pay,

and for the expenses of the hospital care which was a proximate consequence of the injury.

1. We shall not undertake to retrace here the gradual development of the common law doctrines governing liability for torts which cause injury to status relationships; that path has several times been illuminated by historians of recognized authority and competence. See 8 Holdsworth, *History of English Law* (1926) 427–430; 1 Street, *Foundations of Legal Liability* (1906) 263–272; Pollock, *The Law of Torts* (12th ed. 1923) 224–235; Winfield, *A Text-Book of the Law of Tort* (1937) 244–255, 619–623; Wigmore, *Interference with Social Relations* (1887) 21 Am. L. Rev. 764; Green, *Relational Interests* (1934) 29 Ill. L. Rev. 460, (1935) 29 *id.* 1041. More important in the present connection is the recognized scope of that liability in its present development.

(a) Interference with the relationship between husband and wife has long occasioned liability, whether that interference be by violence (*Guy* v. *Livesey*, Cro. Jac. 501) or by enticement (*Winsmore* v. *Greenbank*, Willes 577). There the gravamen of the action is not only loss of services, but loss of consortium as well, and in that aspect the action has survived notwithstanding the gradual and progressive emancipation of married women. See *Place* v. *Searle*, [1932] 2 K. B. 497. Indeed, in England a wife is now allowed an action against a woman who has enticed away her husband. *Gray* v. *Gee*, 39 T. L. R. 429.

Where the defendant's act involves enticing away the plaintiff's wife, or alienating her affections, or engaging in misconduct with her, the plaintiff stresses loss of consortium. E. g., *Boland* v. *Stanley*, 88 Ark. 562; *Bedan* v. *Turney*, 99 Cal. 649; *Mutter* v. *Knibbs*, 193 Mass. 55. *Powell* v. *Benthall*, 136 N. C. 145. But where the defendant is not a rival for the wife's affections, but has injured her, as for example by supplying her with drugs (*Holleman* v. *Harward*, 119 N. C. 150), or, more usually, through negligence, then the plaintiff recovers for the loss of his wife's services. E. g., *Little Rock Gas & Fuel Co.* v. *Coppedge*, 116 Ark. 334; see 1 Schouler, *Domestic Relations* (6th ed. 1921) § 677; Restatement of Torts, § 693. The basis for recovery is the circumstance that the husband, by reason of the marriage relationship, is entitled to the consortium and services of his wife; that he is bound to provide medical care for his wife in the event of her illness or incapacity; and that, when the wife is injured through the tortious act of a third party, the tortfeasor is bound to indemnify the husband for loss of services, loss of consortium, and expenses of medical care.

(b) The relationship between parent and child likewise gives rise to a status, and where the child has been tortiously injured by the act of a third person, the parent has an action against the tort-

feasor—for loss of the child's services. That action is independent of any remedy available to the child, as is graphically illustrated by the father's right to recover damages consequent upon the seduction of a daughter. The daughter has no remedy, because she consented (*Paul* v. *Frazier*, 3 Mass. 71); the action belongs to the father, not because of the disgrace or the debauching of his child (cf, *Eager* v. *Grimwood*, 1 Ex. 61; see *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36, 39) but because the defendant, by getting her with child, deprived the father of her services. E. g., *Barbour* v. *Stephenson*, 32 Fed. 66 (C. C. D. Ky); *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583; *Hewit* v. *Prime*, 21 Wend. (N. Y.) 79; *Lipe* v. *Eisenlerd*, 32 N. Y. 229; *Lawyer* v. *Fritcher*, 130 N. Y. 239; *Pickle* v. *Page*, 252 N. Y. 474; *Evans* v. *Walton*, L. R. 2 C. P. 615. Where the child has been injured through negligence or other tort, the parent's recovery is similarly predicated upon a loss of services. *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Kenney* v. *Baltimore & O. R. Co.*, 101 Md. 490; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *White* v. *Nellis*, 31 N. Y. 405; *Tidd* v. *Skinner*, 225 N. Y. 422; *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163. See also Restatement of Torts, § 703.

The very circumstance that recovery was allowed only for loss of services made the remedy an unsatisfactory one. Thus, where the child was of

such tender years as to be unable to render services, none would be implied from the mere relationship. *Hall* v. *Hollander*, 4 B. & C. 660; but see *Durden* v. *Barnett*, 4 Ala. 169 (suggestion that recovery could be had for loss of child's consortium); *Clark* v. *Bayer*, 32 Oh. St. 299 (basis for recovery is right to services, regardless of actual services). And where the child was not living at home, so that no services were in fact being rendered at the time when she was seduced, there could be no recovery. *Grinnell* v. *Wells*, 7 M. & G. 1033. This called forth Serjeant Manning's oft-quoted note, that "the quasi-fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, and leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers." 7 M. & G. at 1044. By parity of reasoning, since the recovery was for loss of services, the courts held that they were owed to the head of the household, regardless of his relationship to the child (*Peters* v. *Jones*, [1914] 2 K. B. 781; *Beetham* v. *James*, [1937] 1 K. B. 527; *Clark* v. *Bayer*, 32 Oh. St. 299 (action by grandfather having custody of the children)) and that accordingly a widow could not recover damages from one who had seduced her daughter in the father's lifetime. *Hamilton* v. *Long*, [1903] 2 Ir. R. 407, affirmed, [1905] 2 Ir. R. 552; cf. *Buhler* v. *Cohn*, 31 Ga. App. 463. But see *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583, holding that the widow could sue

where the loss of services occurred and the medical expenses were incurred after the father's death.

Along with the recovery for loss of services, the parent obtains reimbursement for the medical expenses incident to the child's injury; the basis for the additional item is the father's duty of maintenance. E. g., *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. 417 (C. C. A. 2); *Sawyer v. Sauer*, 10 Kan. 519. As the court said in the case first cited (59 Fed. at 418),

> A father whose infant child has been injured by the tort or negligence of a third person has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and upon his duty of maintenance. When he is deprived of the right, or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity.

The cogent expression of the Kansas court in *Sawyer v. Sauer* is to the same effect (10 Kan. at 522–523):

> The father is under obligations to support his minor children, and [is] entitled to receive the benefits of their labor. If the injury increases the expense of the one, or lessens the value of the other, he suffers loss, and to this extent has a legal claim for reimbursement. The mere fact that one pays

> the surgeon's bills of a party injured gives no right of recovery, for it may be only a voluntary payment * * *. But where the party paying is, by virtue of the relations subsisting between him and the party injured, bound to pay such bills, any act of a third party which creates a necessity for such bills casts a legal liability upon him.

Indeed, the American cases generally allow recovery for necessary medical expenses even when the child is of such tender years as to be incapable of rendering services. *Durden* v. *Barnett*, 7 Ala. 169; *Sykes* v. *Lawlor*, 49 Cal. 236; *Dennis* v. *Clark*, 2 Cush. (Mass.) 347; *Cuming* v. *Brooklyn City R. R. Co.*, 109 N. Y. 95; see *Hall* v. *Hollander*, 4 B. & C. 660, 662 (*semble, per* Bayley J.).

(c) Similarly there is recovery for loss of services in the basic relationship of master and servant or master and apprentice; any tort which deprives the master of the services to which he is entitled by virtue of the relationship is actionable. E. g., *Woodward* v. *Washburn*, 3 Denio (N. Y.) 369 (false imprisonment); *Ames* v. *Union Ry. Co.*, 117 Mass. 541 (negligence); *Hodsoll* v. *Stallebrass*, 11 A. & E. 301 (maintenance of a nuisance).[12]

---

[12] See also 1 Bl. Comm. *429; 3 Bl. Comm. *142; *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Paramount Productions Corp.* v. *Herbert M. Baruch Corp.*, 135 Cal. App. 351; *Cain* v. *Voltmer*, 19 Idaho 163; *Development Co.* v. *Chidester*, 86 W. Va. 561; *Martinez* v. *Gerber*, 3 M. & G. 88; *Cox* v. *Muncey*, 6 C. B. (N. S.) 375; *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135.

Particularly significant in the present connection is the master-apprentice relationship, which often originated in consequence of statutory provisions and without the consent of the apprentice (1 Bl. Comm. *426; 2 Kent, *Commentaries* (Holmes' 12th ed.) *263; see *Johnson* v. *Dodd*, 56 N. Y. 76), and which could not be readily terminated prior to the expiration of the period fixed in the indenture. See *Cox* v. *Muncey*, 6 C. B. (N. S.) 375, 385. Recovery was allowed whenever the defendant's negligence injured one apprenticed to a plaintiff when that injury deprived the latter of the apprentice's service. We shall consider more at length below, pp. 50–51, the observation of Lord Ellenborough that a soldier is as much bound to the service of the King as an apprentice to that of his master. See *The King* v. *Inhabitants of Norton*, 9 East 206, 210.

2. A number of recent cases deny the master any right to recover from a tortfeasor for loss of the servant's services, primarily on the ground that the modern relationship of employer and employee is almost wholly contractual, and thus is quite different from the master and servant status with which the older common law was familiar. *Chelsea Moving &c. Co.* v. *Ross Towboat Co.*, 280 Mass. 282; *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1; cf. *The Federal No. 2*, 21 F. 2d 313 (C. C. A. 2). The court below seems to have rested its ruling at least in part on this

ground (R. 42–43, 45–46). But we think that the rationale of the cases cited serves only to emphasize the right of recovery for loss of services attributable to injuries to the government-soldier relationship.

The starting point of the cases cited is the frequently quoted remark of Mr. Justice Holmes that "as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 309. See *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.*, 153 F. 2d 869 (C. C. A. 2), certiorari denied, 328 U. S. 835; *Chelsea Moving &c. Co.* v. *Ross Towboat Co.*, 280 Mass. at 286–287 and cases there cited.[13] The next step is to distinguish the "relation of master and apprentice"

[13] Some of those cases are relied on by the respondent here (Br. Opp. 27–28). Thus, in *Brink* v. *Wabash Ry. Co.*, 160 Mo. 87, the parents of a son who was killed as a result of defendant's negligence, and who in his lifetime had contracted to support them, were held not entitled to recover for the loss arising out of non-performance of the contract. In *Connecticut Mut. L. Ins. Co.* v. *New York & N. H. R. R. Co.*, 25 Conn. 265, an insurer was held to have no cause of action against one who, by causing the death of an insured, had obligated the insurer to make payment under the policy. Similarly, in *Byrd* v. *English*, 117 Ga. 191, a printer was not permitted to recover from a contractor who negligently injuring the power lines through which the plaintiff was supplied with

cases, such as *Ames* v. *Union Ry. Co.*, 117 Mass. 541, on the ground that (280 Mass. at 285)—

> The status of apprentice included frequently, if not always, the equivalent of membership in the family of the master. In aspects of nurture and training and education either in a trade or in the schools the relationship bears resemblance to that of parent and child. The right of action in the *Ames* case is strongly akin to that long recognized by the law by the parent for consequential damages from injury to his minor child, including loss of service during the nonage.

Finally, while recognizing that "Some cases of actions by a master to recover damages founded on contract with his servant injured by the tort of the defendant have a contrary tendency", for which see the authorities cited *supra*, p. 37, Rugg, C. J., for the court concluded that they "chiefly arose many years ago when the law of master and servant was comparatively undeveloped." 280 Mass. at 287.

In other words, recovery is denied because the modern relationship of employer and employee

---

electricity pursuant to contract, had deprived the latter's printing establishment of light and power.

See, however, *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, where the Massachusetts court, *per* Holmes, C. J., permitted an employer to recover, in a suit against the manufacturer of a defective article, damages which the employer had previously paid to his employees who were injured by reason of the defect.

is essentially contractual, and does not create a status. Similiarly, in *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1, recovery on the basis of loss of services under the common law doctrine was denied, the court saying (337 Pa. at 5): "It is extremely doubtful whether such a right of action should be recognized under modern conditions. It had its beginnings at a time when the relation of master and servant was totally different from that of today," citing the *Chelsea Moving Co.* case.[14]

The situation of the seaman, whose position approximates more closely to that of the traditional common law servant, and who even today cannot exercise all of the privileges accorded non-maritime workmen (cf. *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31), has evoked a difference of judicial opinion. In the frequently cited case of *The Federal No. 2*, 21 F. 2d 313 (C. C. A. 2), it was held that an employer who was required to pay the hospital expenses of his seaman employee, injured by negligence, was not entitled to obtain reimbursement for his expenditures from the tortfeasor. Judge Manton distinguished the parent-child and husband-wife cases on the ground that (21 F. 2d at 314)—

> This social condition does not exist in the relationship of a seaman and his em-

[14] We consider below, p. 72, the further objection to recovery based on the policy against splitting of causes of action. 337 Pa. at 4–5.

> ployer. It is a contract obligation, which he must perform, that imposes this responsibility, even though it be a special damage he suffers from a tortious act. The cause of the responsibility is the contract; the tort is the remote occasion.

As in the cases just discussed the *ratio decidendi* is the absence of status.[15]

More recently, however, under the influence of this Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, the Third Circuit in *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, allowed recovery in a similar situation. It said (155 F. 2d at 1000–1001):

> In *Seas Shipping Co., Inc.* v. *Sieracki*, Mr. Justice Rutledge makes it plain that the obligations of the ship to its seamen do not rest solely in contract; that a seaman is in effect a ward of the admiralty and that the relationship between owner and seaman, master and seaman, and ship and seaman is in essence a "consensual relationship". We are of the opinion that the relationship of the ship owner to the seaman is more closely analogous to that of father and child than to that of an employer to a mere employee. We prefer to impose a higher degree of dignity upon the ship-seaman relationship, awarding to it a status or a "social condition" in excess of

[15] Judges Swan and A. N. Hand concurred in the result only.

that given under the ruling in *The Federal No. 2*.

Accordingly, Jones being an employee of Waterman and having been injured through the negligence of Reading, Waterman was held entitled to recover from Reading for loss of Jones' services and for any sums which it was obliged to expend for Jones' maintenance and cure.[16]

We need not pause to determine whether the Second Circuit or the Third have more accurately analyzed the position of the seaman. The decisive point here is that recovery by the employer for loss of services is denied only where his connection with the employee is held to be contractual only, where it is held to be not relational, where no status exists. Accordingly, we proceed to analyze the position of the soldier *vis-à-vis* the government, for certainly, if that relation gives rise to a status, the cases discussed at pages 38–42 of this brief are not authority against recovery here.

3. The nub of the present case is that the government-soldier relationship is a status, to which the law attaches reciprocal rights and obligations. This status is similar to but more binding than the other domestic relationships, in that the lot of the soldier is more onerous than that of a child, wife, servant or apprentice, both as to the obligations involved and in respect of the means whereby he

[16] The court relied in part (155 F. 2d at 1001) on the opinion of the district court in the present case.

can terminate the status. We think it necessarily follows that for tortious interference with that status, resulting in loss of the soldier's services, there is the same liability on the tortfeasor as for interference with any of the other statuses.

That the soldier-government relationship amounts to a status is clear both on authority and analysis. This Court said in *In re Grimley*, 137 U. S. 147, dealing with one who became a soldier by voluntary enlistment (pp. 151–152):

> * * * Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. * * *
>
> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State,

would not have entered into the new relations with him, or permitted him to change his status. * * *

Accord: United States v. Williams, 302 U. S. 46.

Analysis of the incidents of the government-soldier relationship confirms this view.

First, it is the government which determines who shall and who shall not become a soldier. Although by statute all males between the ages of eighteen and forty-five are liable for military service (Sec. 1 of the Act of April 22, 1898, c. 187, 30 Stat. 361, 10 U. S. C. 1; Section 3 (a) of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App., Supp. V, 303 (a)), only those who are acceptable to the military are inducted, in the case of men drafted (Section 3 (a) of the Selective Training and Service Act of 1940, as amended), or enlisted, in the case of voluntary applicants for enlistment (10 U. S. C. 621–627).

Second, the government has complete power of discharge. We refer here, not to dismissal or dishonorable discharge as punishment for crime or unbecoming conduct (see *Manual for Courts-Martial* (1928, corrected to 1943) c. XXIII), but to the right of the United States to discharge enlisted soldiers "for the convenience of the government" (Army Regulations 615–365, 24 January 1947), to separate supernumerary or inefficient officers of the regular establishment (*Street v. United States,* 133 U. S. 299; *Creary* v. *Weeks,*

259 U. S. 336) and to return to inactive status officers of the reserve components (*Denby* v. *Berry*, 263 U. S. 29). In none of these cases has the individual any right to be retained in the service. See also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; *Nordmann* v. *Woodring*, 28 F. Supp. 573 (W. D. Okla.); cf. *Patterson* v. *Lamb*, No. 229, this Term, decided January 20, 1947.

Third, the government has an absolute power of control, enforced by rigorous sanctions. As this Court has pointed out (*In re Grimley*, 137 U. S. 147, 153):

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.

Accordingly disobedience of orders is an offense at military law. Articles of War 64 and 65; 10 U. S. C. 1536, 1537. Disobedience of the lawful order of a commissioned officer is in time of war a capital offense. AW 64. Disrespect to officers and non-commissioned officers is punishable, even though no disobedience is involved. AW 63; AW 65; 10 U. S. C. 1535, 1537. And tangible recognition is accorded the supremacy of the civil

authorities by a provision punishing contemptuous or disrespectful language spoken by military personnel concerning the President, the Congress, and certain civil officials. AW 62; 10 U. S. C. 1534.

Fourth, the soldier cannot terminate the status at will. If he absents himself from his post or station without leave, if he shirks important service or hazardous duty, or if he deserts or attempts to desert the service, he commits a military offense. AW 61, 28, 58; 10 U. S. C. 1533, 1499, 1530. In time of war, desertion is a capital offense, AW 58; see Ex. Order 9048, Feb. 3, 1942 (7 F. R. 775), and unauthorized absence can be punished by a long term of confinement. Ex. Order 9267, Nov. 9, 1942 (7 F. R. 9221); cf. Ex. Order 9683, Jan. 19, 1946 (11 F. R. 789) and Ex. Order 9772, Aug. 24, 1946 (11 F. R. 9325). And, though the soldier may have enlisted only for a short term of years, or have been drafted under a statute which limited his service to twelve months, the government can unilaterally extend his obligation to serve for as long as it desires. See Section 2 of the Joint Resolution of August 18, 1941, c. 362, 55 Stat. 626; Section 2 of the Joint Resolution of December 13, 1941, c. 571, 55 Stat. 799, 800.

But the status is not one-sided; the government has obligations also. It is bound to pay the soldier. Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 101 *et seq.* And,

in the event of nonpayment, the soldier may enforce the obligation by suit in the Court of Claims. Judicial Code, Sec. 145 (1); 28 U. S. C. 250 (1); see, e. g., *United States* v. *Dickerson*, 310 U. S. 554. The obligation to pay the soldier continues notwithstanding his injury or incapacity, except in a very limited class of cases where the injury has resulted from the soldier's own misconduct.[17] The same is true as to its obligation to subsist the soldier, except that here there are no exceptions. See 10 U. S. C. 724–726.

Finally, the government is bound to provide the soldier with hospitalization and medical care during periods of incapacitation.[18] Indeed, the

[17] Pay otherwise authorized (by the Pay Readjustment Act of 1942 as amended, 56 Stat. 359, 1037, 37 U. S. C., Supp. V, 101 *et seq.*) may only be withheld, in the absence of court-martial or certain board proceedings, during unauthorized absence from duty in excess of twenty-four hours (Par. 3a, Army Regulations 35–1420, December 15, 1939), or because of the effects of a disease attributable to the intemperate use of alcoholics or habit-forming drugs. Sec. 1 of the Act of May 17, 1926, 44 Stat. 557, 10 U. S. C. 847a; Army Regulations 35–1440, November 17, 1944.

[18] Under the broad authority of the Secretary of War to issue regulations for the hospitalization and medical care of all military personnel (see the Act of July 15, 1939, c. 282, 53 Stat. 1042, 10 U. S. C. 455e), medical attendance was authorized for all enlisted men at all times in question in this case. Par. 2b (d), Army Regulations 40–505, September 1, 1942. Substantially similar provisions are contained in Army Regulations 40–505, December 5, 1945, as changed by Changes No. 1, February 28, 1946, now in force. Under Section 3 (d) of the Selective Training and Service Act of 1940, 54 Stat. 885, 886, 50 U. S. C. App. 303 (d), inducted personnel are entitled to all benefits accorded other enlisted men.

very purpose of the Medical Department of the Army is to provide just such care—and ever since the days of the Revolution and the Continental Congress, provisions to that end have been on the books. See *Military Laws of the United States* (8th ed. 1939), pp. 62–63.

Comparison of the foregoing incidents of the government-soldier relationship with the incidents of other relationships traditionally protected against torts resulting in loss of services serves to illustrate not only that the former relationship is more durable and all-permeating than the others, but also that it contains all the elements inhering in the others. That being so, there is every reason why it should be equally protected. And see *infra*, pp. 65–66.

(a) "A servant is a person subject to the command of his master as to the manner in which he shall do his work." *Yewens* v. *Noakes*, 6 Q. B. D. 530, 532, *per* Bramwell, L. J. It is the master's power of control which is the most decisive factor in determining whether a particular individual is his servant, or that of another, or is an independent contractor. *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; see *Boswell* v. *Laird*, 8 Cal. 469, 489. The other elements of the master-servant relationship are the master's right of selection and engagement of the servant; the master's duty to pay wages; the master's power of dismissal; and the master's control of the servant's

actions. See 2 Kent, *Commentaries* (Holmes' 12th ed.) *258–260; 2 *Mechem, Agency* (2d ed. 1914) § 1863; 35 American Jurisprudence, *s. v.* Master and Servant, § 3; Roberts and Wallace, *Employer's Liability* (4th ed.), p. 78; 37 L. R. A. 38. All of those elements are present in the government-soldier relationship. But, while the servant may leave his employ at will, subject to liability in damages for breach of contract, the soldier's departure from his place of duty, is, as has been shown, a military offense; and while the servant's right to combine with others in a strike in order to better his condition received increasing recognition in the Nineteenth Century (see Landis, *Cases on Labor Law* (1934) 16–26, 32–36), similar action on the part of military personnel still amounts to mutiny, a most serious military offense which is capital even in time of peace. AW 66; 10 U. S. C. 1538.

(b) The apprentice was indentured to the master for a term of years. 1 Bl. Comm. *426; 2 Kent, *Commentaries* (Holmes' 12th ed.) *261. Frequently the arrangement was not even nominally consensual, as, for instance, where poor children were apprenticed to a master by the overseers who had charge of them for the community. E. g., *Johnson* v. *Dodd*, 56 N. Y. 76. Because the relationship was one of tutelage, it was long ago remarked that a soldier is as much bound to the service of the King as an apprentice to his master. *The King* v. *Inhabitants of Norton*, 9 East 206,

210 (1808), *per* Lord Ellenborough. Yet an apprentice could emancipate himself from his master by enlisting in the army, *Johnson* v. *Dodd*, 56 N. Y. 76, while a soldier can not remove himself from army control by enlisting in the Navy or in the Marine Corps or in another unit of the Army. Quite the contrary; the second enlistment amounts to desertion. AW 28; 10 U. S. C. 1499.

(*c*) Certain similarities between the status created by the contract of enlistment and the status created by the marriage contract are adverted to by the Court in *In re Grimley*, 137 U. S. 147, 151–152. Perhaps it is only necessary to add that the government's control over the soldier is somewhat more substantial than that of the husband over the wife, even as of the palmy days when "husband and wife were one and the husband was that one"; and that the marriage contract is under modern statutory provisions more easily rescinded and dissolved than is the contract of enlistment. After all, not even the unhappiest recruit can revert to civilian status on a showing of incompatibility or mental cruelty.

(d) Just as the apprentice can free himself from his master's control by enlistment, so also can a minor entering the military service emancipate himself from the control of his father. *United States* v. *Williams*, 302 U. S. 46, 49; *In re Morrissey*, 137 U. S. 157, 159–160; *In re Miller*, 114 Fed. 838, 842–843 (C. C. A. 5); *United States* v. *Reaves*, 126 Fed. 127, 130 (C. C. A. 5); *The King* v. *Inhabitants of Rotherfield Greys*, 1 B. &

C. 345. Here again, a similar dissolution of status is denied the soldier. But there are still similarities between the parent-child relationship and the government-soldier relationship. In each there is an obligation of service and obedience on one hand and a duty of support and maintenance on the other. Significantly enough, this Court has observed that the relation of the Government to its soldiers "if not paternal was at least avuncular." *White* v. *United States*, 270 U. S. 175, 180.

Thus it is clear that the relationship involved in the instant case presents precisely those elements which historically gave rise to and which have continued to vitalize the doctrine that a master, husband, or parent may recover for the loss of services of his servant, apprentice, wife, or child. As we have pointed out, even if the position of the government *vis-à-vis* the members of its armed forces is not precisely one *in loco parentis*, it is clear that its right to their services is more firmly-established, more far-reaching, and more protected by drastic sanctions, than was the master's when the doctrine took shape. To hold, as did the court below, that no recovery can be had in the instant case because the government-soldier relationship is less consensual than the modern employer-employee relationship (R. 43-46) is to ignore not only the solid doctrinal common law foundation upon which the instant action is rested, but to ignore also that through all the decisions over the last seven centuries which have

established and strengthened the loss of service doctrine runs the common core of policy of protecting the interest which one party has in the obligation of service of another. Cf. *Syas Shipping Co.* v. *Sieracki*, 328 U. S. 85; Holdsworth, *supra*, p. 30, note 11. The conclusion of the court below, that protection will not be afforded a relationship closely approximating statuses historically covered simply because the formation and continuation of the modern employer-employee relationship is more consensual now than formerly, is, we submit, anomalous and untenable.

4. We do not regard it as material that the inception of the government-soldier relationship in the present case was non-consensual, Etzel having been drafted. It is true that a voluntary enlistment in the Army is contractual (*In re Grimley*, 137 U. S. 147, 151; *In re Morrissey*, 137 U. S. 157, 159; *United States* v. *Williams*, 302 U. S. 46, 49), and that "the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same" (*Selective Draft Law Cases*, 245 U. S. 366, 371). Section 3 (d) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 303 (d)) specifically declares ~~that drafted~~ men are entitled to the same pay and benefits as men voluntarily enlisted. The situation of the drafted soldier could no doubt be brought within the rubric of contract by calling it a contract implied in law. But the gist of the matter is that, as this Court has pointed out, the relationship creates a status,

and it is really quite immaterial how the status is created. Its incidents remain the same, and it is equally entitled to protection, whether the soldier enlists or whether he is drafted.

The other statuses protected against a tortious interference that results in a loss of services are not necessarily created by contract or even by mutual consent. Marriage is; the master-servant relationship generally is; apprenticeship in the case of pauper children was created quite without a consensual act. See *Johnson* v. *Dodd*, 56 N. Y. 76. And, while the parent-child relationship may be consensual *vis-à-vis* the parent when it arises by adoption, certainly it never is so far as the child is concerned. Yet no one has ever suggested that, when the child is injured, the parent's recovery for loss of services is to be denied because his relationship to the child was not contractual. None the less, the court below denied recovery to the United States for the loss of services of its soldier on substantially that ground (R. 46).

5. Equally untenable is the reliance of the circuit court of appeals on state militia cases which deny an injured militiaman the right to sue under the local workmen's compensation act. See *Hays* v. *Illinois Terminal Transp. Co.*, 363 Ill. 397; *Goldstein* v. *State*, 281 N. Y. 396; *Lind* v. *Nebraska National Guard*, 144 Neb. 122, all cited at R. 45. For the first two decisions both rest on the ground that under the applicable state statutes the injured militiaman's remedy must be

sought under the state's military code, not under its workmen's compensation law, and the third case, though adopting the results reached by the others, rests at least alternatively on the ground that the militiaman's claim was filed out of time.

Obviously such cases, even on the assumption that they were rightly decided, are not dispositive of the present controversy. We are concerned here with the government's right to recover from a tortfeasor, who has injured a soldier, damages for the loss of that soldier's services; those cases merely consider the nature of the injured soldier's statutory rights against the government. The tortfeasor's liability obviously remains unaffected by any arrangements made by the government for the benefit of its soldiers.

The irrelevance of the militia cases (and see also the authorities cited *supra*, p. 26, note 5), becomes even more clear when we consider the present statutory compensation scheme for Army reserve personnel injured while on active duty. If the reserve officer or soldier is injured while on active duty for more than thirty days, he is entitled to the same pensions, compensation, retirement pay, and hospital benefits as are available for officers and enlisted men of the Regular Army of corresponding grades and length of service. Section 5 of the Act of April 3, 1939, c. 35, 53 Stat. 555, 557, as amended; 10 U. S. C. 456. If, however, the reservist's tour of active duty, in time of peace, is for less than thirty

days, then he is entitled only to such benefits as are accorded civil employees under the United States Employees' Compensation Act. Act of July 15, 1939, c. 284, 53 Stat. 1042; 5 U. S. C. 797." Obviously, the military status of the reserve officer or soldier on active duty, *vis-à-vis* the government, is not varied by the length of his tour; and, equally obviously, that factor cannot have the slightest effect on the liability, *vis-à-vis* the government, of a tortfeasor who injures the reservist.

In this connection, also, it is necessary to bear in mind that, while injury to a public servant by a tortfeasor may entail liability under the familiar doctrine of trespass *per quod servitium amisit*, there may still be reasons of policy why torts by the public servant should not make the public body liable under the rule of *respondeat superior*. Thus, in *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135, the municipality was permitted to recover for loss of services against one who had injured one of its constables, while in *Fisher* v. *Oldham Corporation*, [1930] 2 K. B. 364, one injured by the tort of a police officer was denied recovery against the municipality. This may account, we believe, for the decision of the Canadian Exchequer Court in *McArthur* v. *The King*, [1943] 3 D. L. R. 225, which was a petition of right against the Crown in respect of a soldier's tort. Recovery was denied on the

ground that the master and servant relationship did not exist. In *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209, on the other hand, which was an information on behalf of the Crown for loss of services of members of the Royal Air Force, the relationship of master and servant was held to exist, and recovery was had for their pay during incapacitation together with the expenses of their hospitalization.

In this connection it may well be significant that the doctrine of *respondeat superior* arose long after the loss of services doctrine, and historically formed no part of it. Certainly in other situations the right to recover damages for loss of services is wholly independent of a liability arising out of *respondeat superior*. Thus, an agent may be able to bind his principal in many situations where the principal has no corresponding right to recover from a tortfeasor for loss of the agent's services. And, conversely, a parent may recover for the loss of services of a child in circumstances where the actions of the child could not possibly bind or entail liability on the part of the parent.

6. The real vice of the decision below is that it denies recovery to the United States on two mutually contradictory theories. On the one hand, the court says that the government cannot avail itself of the common-law action of a master for loss of his servant's services because the relation-

ship between government and soldier is more legislative than contractual (R. 46). On the ther hand, the court insists that "the master's cause of action for loss of his employee's services remains as an anomaly in the law" (R. 43) because it permits recovery by one with whom the injured party was only connected by contract (*id.*).

Actually, of course, the loss of services doctrine is not an anomaly at all, but an ancient and recognized doctrine of great vitality. It is far older by centuries than any of the modern concepts of contract. And as that great master of legal history, the late Sir William Holdsworth, pointed out (3 *History of English Law*, (3d ed. 1923) 677):

> * * * actions *per quod servitium* and *per quod consortium amisit* are * * * ultimately * * * based upon the very peculiar history of the legal relations of master and servant, which has caused those relations to retain a number of ideas based on the conception that the servant occupies a status. The Statutes of Labourers deliberately introduced into the contractual relation some of the incidents of older status; and the courts of common law, quite apart from those statutes, held that the master's right to his servant's service was definite enough to be safeguarded by an action in tort against a person who retained a servant after notice of an employer's claim. [*Blake* v. *Lanyon*, 6 T. R. 221.] It

> is pretty clear also that the famous decision in *Lumley* v. *Gye* [2 E. & B. 216] to the effect that a persuasion to break any contract without just cause or excuse is actionable, is traceable historically to the firmness with which the judges have maintained the idea that the master has something in the nature of a real right to his servant's services.

The basic substantive error of the court below (apart from its misconception as to the proper choice of law; pp. 18–28, *supra*) lies in its refusal to apply a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept, simply because the old situation today is more frequently met with in modern dress. Specifically, the fundamental error is the court's unwillingness to apply the loss of service doctrine to the government-soldier relationship, a relationship in every essential respect identical with the traditional master-servant status (except only that it is far more binding), simply because the master-servant status of today, in its modern aspect of employer and employee, is essentially contractual in nature, and has probably ceased to be a status.

We have pointed out above, pp. 44–45, that this Court has recognized the government-soldier relationship as a status, and we have the assurance of Holdsworth that, Maine's much-quoted apothegm

notwithstanding, new forms of status are constantly arising in progressive societies. Said Sir William (3 *History of English Law* (3d ed. 1923) 455–456):

> Maine's famous dictum that "the movement of progressive societies has hitherto been a movement from status to contract," is a generalization from the historical development of institutions and rules which originated in the patriarchal family. It is applied by Maine only to that department of law which mature legal systems style private law, and chiefly to that department of private law which comprehends those topics which the Roman institutional writers grouped under the rubric "law of persons." If we except those forms of status due to youth or mental incapacity, which must necessarily be found in all legal systems at all stages of their development, the dictum is in this department of private law very largely true. Thus, in Roman law, if we compare the status of the filius-familias or the married woman in the early days of Roman law with their status under Justinian; and if we look at the elimination of the status of mancipium, and the gradual assimilation of the class of libertini to that of ingenui, we see instances of the operation of this principle. Similarly, we can see it in operation in English law if we look at the history of the status of the villein and the married woman. But we must not give the dictum a greater extension than its author intended. In particular we must note

that it has never had any direct application in the sphere of public or semi-public law. On the contrary, the growth in progressive societies of the complexity both of the state and of social, commercial, and industrial relations has led to the growth of new varieties of status. Under the later Roman Empire the soldier and the civil servant occupied a far more definitely defined status than in primitive society; and under the early empire one of the effects of the change in the character of slavery produced by the foreign conquests of Rome was the statutory creation of the status of the Latini Juniani and the Dediticii. Under all modern systems of law the soldier, and under most continental systems of law the civil servant, occupy a status unknown to early systems of law; and the growth of corporations has added a new population of artificial persons to all modern states. Religion, too, has at all times claimed for its priests a special status; and this special status of priests, and the still more special status of those who occupy the higher ranks in religious hierarchies, have been, both in ancient and in modern societies, perhaps the most enduring of all forms of status. No doubt the decay of certain forms of status, and the appropriation of the sphere which they once occupied by the law of contract is the mark of certain progressive societies. But new forms of status have been constantly arising and it is the fact that the societies in which they have arisen

are progressive societies that is the cause and occasion for their creation.[19]

The basic question in the present case is whether the law of today has still the vitality of the law of old, so that it can adapt the tested principles of the past to the constantly changing fact situations of today. Cf. Holdsworth, *Some Makers of English Law* (1938), *passim*. The circumstance that, as the court below remarked (R. 45), "the government has never asserted this cause of action before," or that the first reported case on the subject dates only from 1935,[20] is, of course, immaterial. Similar objections interposed in this same field—interferences with status—have never succeeded in the past. Even in the most rigid period of the Eighteenth Century common law, the Court of Common Pleas refused to arrest judgment in an action for enticing away a man's wife simply because there was not precedent for such an action. *Winsmore* v. *Greenbank*, Willes 577, 580–581 (1745).[21]

---

[19] In view of this discussion, it seems to us unnecessary to turn to the *institution* of the French jurists, or to subject Sir Henry Maine to the assaults of critical sociologists. Cf. R. 13–17, 23.

[20] *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209.

[21] And see *Chapman* v. *Pickersgill*, 2 Wils. 145, 146 (1762), *per* Pratt, C. J. (later Lord Camden): "But it is said this action was never brought; and so it was said in *Ashby* v. *White*: I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief * * *."

The Twentieth Century has not until this time been less resourceful than the Eighteenth. Prior to *Gray* v. *Gee*, 39 T. L. R. 429, there was no precedent for a wife's action against another woman for enticing away a husband; but the action was allowed. Nor was there, before *Daily* v. *Parker*, 152 F. 2d 174 (C. C. A. 7), any reported case holding that the parent-child relationship supported an action by the children against the woman who enticed away their father. Here again, the court found no difficulty in applying old principles to a new state of facts; it permitted the plaintiffs to maintain the proceeding. More recently, there has been a successful attempt, notwithstanding *Dietrich* v. *Northampton*, 138 Mass. 14, to permit a viable child to recover for injuries suffered in the process of birth as a result of negligence. *Bonbrest* v. *Kotz*, 65 F. Supp. 138 (D. D. C.). And only at the last Term, this Court found it possible to fashion a remedy within the pattern of familiar principles to protect a longshoreman performing work which in earlier days was more usually done by a seaman. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

Up to now the common law has never been straitjacketed by the lack of exact precedents, just as long as the right invaded was one similar to rights for which recognized remedies were available. Cf. Pound, *The Spirit of the Common Law* (1924) 183. Indeed, as the late Chief Justice pointed out, a case such as the present one is

really a measure of the law's vitality, and of its capacity for growth. See Stone, *The Common Law in the United States* (1936) 50 Harv. L. Rev. 4, 9–10:

> If, with discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.
>
> It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt, and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial lawmaking. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply. * * * The skill, resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage, not unmindful that continuity and symmetry of the law are themselves such advantages, and with which they make choice among them in determining whether precedents shall be

extended or restricted, chiefly give the measure of the vitality of the common-law system and its capacity for growth.

With all deference to the learning reflected in the district court's opinion, we find it unnecessary to go beyond the confines of the common law to establish the government's right to recover here. We have pointed out above at some length, pp. 43–53, that every element of the relationships traditionally protected against torts which result in a loss of services is present in the government-soldier relationship that is here in issue. Indeed, as we have shown, the obligation of service resting on the soldier is far more onerous than that of the child, wife, servant or apprentice. Dissolution of the relationship cannot be had by unilateral action of the soldier; all of the others are easier of termination.

By way of emphasizing the right of the United States to the services of its soldiers, we might add that the act of preventing the United States from obtaining such services is a criminal offense (Section 11 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311; cf. *Billings* v. *Truesdell*, 321 U. S. 542, 556–558); that any obstruction to enlistment in time of war, i. e., preventing the consummation of a contract of service, is likewise criminal (Section 3 of Title I of the Act of June 15, 1917, c. 30, 40 Stat. 219, as amended; 50 U. S. C. 33); and that harboring a deserter, i. e., one who unilaterally is seeking to

avoid such service, is also an act entailing criminal liability. Section 42 of the Criminal Code, 18 U. S. C. 94; see *Beauchamp* v. *United States*, 154 F. 2d 413 (C. C. A. 6), certiorari denied, October 14, 1946 (No. 230, this Term).[22]

We are dealing here with realities, not with labels. A master has such a right to the services of his servant or apprentice that any tort which deprives him of those services entails liability to the master. The same is true of the husband's right to the services of his wife and of the parent's right to the services of his child. The government's right to the services of its soldiers is a right far superior to any of those just enumerated. We submit that there necessarily exists a similar right to recover damages when a tortfeasor deprives it of those services, services growing out of a relationship created by law pursuant to an express grant of constitutional power.

III

THE RELEASE EXECUTED BY THE SOLDIER IN RESPONDENTS' FAVOR IS IMMATERIAL, SINCE THE UNITED STATES HAS AN INDEPENDENT CAUSE OF ACTION UNDER WHICH IT RECOVERS ONLY FOR THE DAMAGES IT HAS ITSELF SUSTAINED.

The court below held (R. 46) that the release of his own claims executed by Etzel in favor of

---

[22] Compare the criminal liability involved in conspiring to deprive the United States of the faithful and disinterested services of an Army officer. *United States* v. *Bayer and Radovich*, No. 606, this Term.

respondents (R. 9) constituted a complete bar to the present action by the United States for loss of services, measured by the wages paid Etzel during his incapacity and by the cost of his hospitalization. Respondents here assert the correctness of that holding (Br. Opp. 23–25), and contend in addition that, even if the United States were entitled to any recovery, it can not recover for Etzel's wages and medical expenses (Br. Opp. 21–34).

We submit that the holding below and respondents' contentions here are both based on a misconception of the nature of the claim asserted by the United States. That claim is an independent cause of action collateral to and not consequent upon the soldier's cause of action. Hence recovery by the United States is neither dependent on nor barred by any recovery which the soldier may have had or by any release which he may have given. And the items of recovery sought here—the actual out-of-pocket expenses of the soldier's pay during his incapacity and of the cost of his hospitalization—are recognized as items of recovery in like cases, and are, as applied to the present kind of action, far from excessive.

1. The gravamen of an action of trespass *per quod servitium amisit* is the master's loss of services, not the injury to the servant. If the servant is beaten, but not sufficiently to incapacitate him, the master has no action. *Voss* v. *Howard*, 1

Cranch, C. C. 251, Fed. Case No. 17013 (C. C. D. C.). All this has been well understood since the time of Coke. See *Robert Marys's Case*, 9 Co. Rep. 111b, 113a:

> * * * if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod, viz. per quod servitium, &c. amisit;* so that the original act is not the cause of his action, but the consequent upon it, *viz.* the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.

The injury to the servant and that to the master are collateral to and not consequent upon each other; the servant sues for personal injuries, the master for loss of services. See *Martinez* v. *Gerber*, 3 M. & G. 88, 90–91. So, too, the child sues for personal injuries and the parent for loss of services. *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163; *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 400; *Franklin* v. *Butcher*, 144 Mo. App. 660; cf. *Whitney* v. *Hitchcock*, 4 Denio

(N. Y.) 461. The husband, likewise, sues for loss of services and consortium, while the wife alone can recover for personal injuries. *Erickson* v. *Buckley*, 230 Mass. 467; *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.); compare *Blair* v. *Chicago & Alton R. R. Co.*, 89 Mo. 334, with *Blair* v. *Chicago & Alton R. R. Co.*, 89 Mo. 383.

It follows that a prior recovery by the child in respect of personal injuries will not defeat a subsequent suit by the parent for loss of services. *Wilton* v. *Middlesex R. Co.*, 125 Mass. 130. Indeed, the parent recovers in the seduction cases for a loss of services in circumstances where the debauched daughter has no right of action of her own. *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36; and see *supra*, pp. 33–36. Similarly, the husband's action for loss of services may succeed despite the failure of the wife's action for personal injury. *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.). And by parity of reasoning, recovery by the servant for his personal injuries is no bar to a later action by the master for loss of services. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Bradford Corporation* v. *Webster*, [1920] 2 K. B. 135; *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. The seaman in *Jones* v. *Waterman S. S. Corp.* had settled with the tort-feasor, 155 F. 2d at 995, yet Waterman was allowed to recover for loss of services. The constable in *Bradford Corporation* v. *Webster* had

recovered from the tortfeasor, [1920] 2 K. B. at 143, as had the injured aircraftsmen in the *Valle-Jones case,* [1935] 2 K. B. at 210, 215; recovery for loss of services was allowed in each instance. And while, as has been noted, recovery was denied in *Commonwealth* v. *Quince,* 68 Comm. L. R. 227, the majority did not rest their decision on the circumstance that the soldier had already obtained payment from the tortfeasor.

It follows from the foregoing that the district court was right in holding that the claim of the United States was not barred by Etzel's release (R. 20, 31), and that the court below erred in reaching a contrary conclusion.

2. The same failure to recognize that the government's cause of action for loss of services was separate and distinct from the soldier's cause of action for personal injuries led the court below to rest its denial of recovery on the ground that under the prevailing American rule, an injured person may recover for wages lost and medical expenses incurred during his incapacity even though such amounts were supplied by insurance, contract of employment, or gratuitously; that Etzel's release to the respondents (R. 9) which extended to "all claims of every nature and kind whatsoever" covered his lost wages and medical expenses; and that the United States may not be subrogated to the soldier's claim because the respondents have already paid Etzel for his losses (R. 46-47).

It may be that, under some of the cases, the measure of recovery allowed the victims of negligence is too generous, and work injustice to tortfeasors, as where the latter are not entitled to deduct for compensation which the injured person is receiving from the Government. E. g., *Cunnien* v. *Superior Iron Works,* 175 Wis. 172; *Wood* v. *Ford Garage Co.,* 162 Misc. 87; see note 23, *infra,* p. 74. But the circumstance that the injured servant gets too much is no ground for denying the master any recovery at all for loss of services. And since the loss of service cases involve two distinct causes of action, it is both misleading and erroneous to invoke cases where there is but a single cause of action and the employer sues the tortfeasor as subrogee of the employee's claim. E. g., *Travelers' Ins. Co.* v. *Great Lakes Eng. Co.,* 184 Fed. 426 (C. C. A. 6); *Stinchcomb* v. *Dodson,* 190 Okla. 643. The basis of the employer's recovery in the latter kind of case is the employee's claim for injury which the employer has theretofore paid. The same concept underlies federal statutes which permit subrogation by the United States, and which were relied on by the court below (R. 48). E. g., 5 U. S. C. 776–777; 38 U. S. C. 421, 502; cf. *American Stevedores* v. *Porello,* No. 69, this Term, decided March 10, 1947. In the present case, however, the United States appears, not as Etzel's subrogee in respect of the injuries to his person, but in its own right, on

account of the injury to the United States which caused it to lose Etzel's services.

3. Once the independent nature of the government's cause of action is recognized, all talk of "splitting a cause of action," as in *Philadelphia* v. *Philadelphia Rapid Transit Co.*, 337 Pa. 1, is of course irrelevant. If there were a single cause of action, as in the subrogation cases, then, obviously, recovery for all the elements of damage should be sought in one proceeding. But since here separate, independent, and essentially unrelated rights are being asserted, there can be no question of "splitting," even though, as a matter of convenience, permissive joinder of the two actions could be had. See, e. g., *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331 (App. D. C.) (husband and wife); *Erickson* v. *Buckley*, 230 Mass. 467 (same); *Berringer* v. *Great Eastern Ry. Co.*, L. R. 4 C. P. D. 163 (parent and child). Consequently, as in the first two cases cited, recovery could be had on one and not on the other, without vitiating inconsistency.

4. The measure of damages sought here was based on the government's out-of-pocket expenditures. As we have shown, *supra*, pp. 47–48, the United States was under an enforceable statutory duty to continue Etzel's pay during hospitalization. It was also under a duty, based in part on statute and in part on regulations having the force of law, to provide him with medical treatment. See p. 48, *supra*; and note Section 3 (d)

of the Selective Training and Service Act of 1940, 50 U. S. C. App. 303 (d), providing that drafted men are to be allowed all benefits accorded other enlisted personnel. The damages asked for in the instant action represent the sums expended for the medical care which was furnished the injured soldier, and for the salary which was paid him (R. 4, 8).

Where the master is under a duty to maintain the servant, which is always the case in actions by a parent for loss of services of his child, expenditures for hospital and medical care required by the defendant's tort have always been considered a proper element of the master's or parent's damages. *Netherland-American Steam Nav. Co.* v. *Hollander*, 59 Fed. 417 (C. C. A. 2); *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992 (C. C. A. 3); *Sawyer* v. *Sauer*, 10 Kan. 519; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Coon* v. *Moffitt*, 2 Pen. (N. J.) 583; *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Hodsoll* v. *Stallebrass*, 11 A. & E. 301; *Martinez* v. *Gerber*, 3 M. & G. 88; *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209. Indeed, in cases involving injuries to minor children of such tender years as to be incapable of rendering services, recovery of the expenses of hospitalization is allowed on the ground that the parent was bound to incur this expenditure as a part of his duty to the child. See *Dennis* v. *Clark*, 2 Cush. (Mass.) 347; *Durden* v. *Barnett*, 7 Ala. 169; *Sykes* v. *Lawlor*, 49 Cal. 236; *Cuming* v.

Brooklyn City R. R. Co., 109 N. Y. 95; cf. *Hall* v. *Hollander*, 4 B. & C. 660, 662. Similarly, in this case, the United States was bound to hospitalize the soldier.[23] To have discharged Etzel forthwith would have been unlawful as well as inhumane; and, in any event, Etzel even as a discharged soldier could have recovered his medical expenses in his own action for personal injury. *District of Columbia* v. *Woodbury*, 136 U. S. 450; *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545; *Carangelo* v. *Nutmeg Farm*, 115 Conn. 457; *Eureka Block Coal Co.* v. *Wells*, 29 Ind. App. 1; see *Attorney General* v. *Valle-Jones*, [1935] 2 K. B. 209, 217–220.

The same is true as to the pay received by Etzel. If he had been discharged because of the injury, he could have sued respondents for his loss of

[23] The rule denying the tortfeasor the right, in an action for personal injuries brought by the injured employee, to deduct sums received by that employee by way of compensation from other sources, see R. 46–47, appears to have been primarily established in cases where the defense has been raised against the injured party in instances where the person supplying his wages and hospital expenses did so gratuitously, or under a contract of insurance. That rule has not been universally adopted and in other states the issue whether the payments are in fact gratuitous will govern the result. See the cases collected in 18 A. L. R. 678–683 and 98 A. L. R. 575–579; and compare *Illinois Central R. Co.* v. *Porter*, 117 Tenn. 13, 31–32 (tortfeasor not entitled to deduct from ordinarily consequential damages salary actually paid injured postal clerk because, under postal laws, payment during illness was a matter for discretion of postal officials and hence could be considered a gratuity).

earnings; here they are called on to pay that sum to the United States. In the *Valle-Jones* case, recovery of the aircraftsmen's pay was held to be a proper item of damages, and in *Commonwealth* v. *Quince,* 68 Comm. L. R. 227, although recovery was denied, a majority of the court agreed that pay plus medical expenses would be a proper measure of damages if the action were maintainable.

5. Actually, the measure of the United States' damages on which the judgment of the district court was based was a generous one so far as the respondents were concerned. No question arises as to the expenses of hospitalization; that amount was stipulated (R. 8). But to measure the United States' loss of services on the footing that it paid Etzel $69.31 as military pay (R. 4)—money for which it received no equivalent since Etzel was incapacitated—is in at least two respects short of what the United States lost by reason of respondents' tort.

(a) The United States was not only bound to pay Etzel during his incapacity, it was bound to subsist him, see 10 U. S. C. 724–726, and for this additional expenditure, which it was bound by law to make, it received no return either. We think that the cost of subsistence could well have been included as an item of damages. Certainly if Etzel had been discharged because of incapacity immediately upon being injured, it is elementary that he could have recovered from the tortfeasors

a sum representing his loss of earning power, which would undoubtedly have included the commuted value of all the benefits of subsistence, shelter, and clothing which were incident to and inseparably connected with his employment, which had a substantial value, and of which he had been deprived by reason of the defendants' tort. See Section 10 of the Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 110.

(b) The United States is seeking to recover pay from the respondents on the view that it paid Etzel but, because of the tort, received no services. The record does not indicate Etzel's grade or length of services, both of which are material in determining his pay. See Section 9 of the Pay Readjustment Act of 1942, as amended; 37 U. S. C., Supp. V, 109. But assuming that he was a private with less than three years' service, and not qualified in arms or serving in a branch of service or in a capacity entitled to additional pay,[3] he would not have been receiving more money at the

[3] See Sec. 18 of the Pay Readjustment Act of 1942, as amended, 37 U. S. C., Supp. V, 118 (flying, parachute, and glider pay); Act of April 10, 1943, c. 47, 57 Stat. 62, 37 U. S. C., Supp. V, 118b (diving pay); Sec. 16 of the Pay Readjustment Act of 1942, 37 U. S. C., Supp. V, 116 (extra pay for qualification in the use of arms); Sec. 1 of the Act of June 30, 1944, c. 335, 58 Stat. 648, 10 U. S. C., Supp. V, 1430a (extra pay for wearers of expert and combat infantrymen's badges); Sec. 1 of the Act of July 6, 1945, c. 279, 59 Stat. 462, 10 U. S. C., Supp. V, 1430b (extra pay for wearers of the medical badge); 10 U. S. C. 696 and 1430 (extra pay for wearers of certain decorations).

end of a year's training than when he first took the oath as an inductee or recruit. Yet obviously the United States would have lost more if deprived of the services of a trained soldier than of those of an untrained one. The scope of the recovery sought in this case gives the respondents the benefit of any doubt as to whether the injured soldier was specially trained—a not inconsiderable advantage "at a time when the government-soldier relation has attained its most exacting standards and its greatest dignity." See Note (1946) 41 Ill. L. Rev. 551, 558.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed, with directions to reinstate the judgment of the district court.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
EMERY COX, JR.,
BONNELL PHILLIPS,
JANE A. PARKER,
Attorneys.

MARCH 1947.

U. S. GOVERNMENT PRINTING OFFICE 1947